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No. 02-1315

IN THE
SUPREME COURT OF THE UNITED STATES

GARY LOCKE,
Governor of the State of Washington, *et al.*,
Petitioners,

v.

JOSHUA DAVEY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, NORTH PARK THEOLOGICAL SEMINARY, THE WORLDWIDE CHURCH OF GOD, AND CLIFTON KIRKPATRICK, AS STATED CLERK OF THE PRESBYTERIAN CHURCH (U.S.A.) AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

The United States Conference of Catholic Bishops ("USCCB") is a nonprofit corporation, the members of which are the active Catholic Bishops in the United States.[1] USCCB advocates and promotes the pastoral teachings of the U.S. Catholic Bishops in such diverse areas of the nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the Conference are the protection of the First Amendment rights of religious organizations and their adherents, and the proper development of this Court's jurisprudence in that regard.

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[1]Pursuant to Supreme Court Rule 37.6, counsel for these amici state that they authored this brief, in whole, and that no person or entity other than the amici made a monetary contribution toward the preparation or submission of this brief. Both parties have consented to the filing of this brief. A letter of consent from respondent is on file with the Clerk of the Court, and a letter of consent from petitioners is filed herewith.

The Bishops of the United States have long recognized and supported quality education at all levels and the right of individuals to pursue the education of their choice free from governmental discrimination. For the State of Washington to deny a Promise Scholarship to respondent, who met all the neutral criteria to receive such an award, solely because he declared a major in Pastoral Ministries, clearly presents just such a case of governmental discrimination. The discriminatory decision of the State of Washington violated principles embedded in the Free Exercise, Equal Protection and Free Speech Clauses of the Constitution and was rightly overturned by the United States Court of Appeals for the Ninth Circuit.

The North Park Theological Seminary is the sole seminary sponsored by, and training clergy for, the Evangelical Covenant Church, a Protestant religious denomination. It has an interest in the theological training and the training of Evangelical Covenant Church clergy for ministry in denominational and parachurch ministries. North Park Theological Seminary appears as an amicus herein to urge the Court to protect the First Amendment rights of religious organizations and persons motivated by religious beliefs in Washington State and elsewhere, and to affirm the right of religious adherents to participate in government benefit programs without suffering discrimination in the administration of those programs.

The Worldwide Church of God, a California corporation, began in the early 1930's in Eugene, Oregon. Subsequently it was incorporated in California in 1947 where it maintains its worldwide headquarters. The Church has congregations throughout the United States and affiliate churches in many foreign countries. The Church sponsors Ambassador College, a collegiate, seminary, distant learning program, and, hence, the Church has a material interest in issues pertaining to financial aid.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million members in more than 11,500 congregations, organized into 173 presbyteries under the jurisdiction

of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706.

This brief is consistent with the policies adopted by the General Assembly regarding the religious liberty guarantees of the "First Amendment". The 200th General Assembly of the Presbyterian Church (U.S.A.) expressly addressed these issues:

> Government payments on behalf of individuals, under programs such as . . . scholarship assistance, should without exception be available to . . . students at church sponsored agencies and institutions on exactly the same terms as if those . . . [students] were receiving their services from secular agencies. . . . Government must be neutral in matters of religion.

Presbyterian Church (U.S.A.), God Alone Is Lord of the Conscience, A Policy Statement Adopted by the General Assembly 42-43 (1988). The General Assembly does not claim to speak for all Presbyterians, nor are its decisions binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of respect and prayerful consideration of all the denomination's members.

SUMMARY OF ARGUMENT

A government may not target religion for adverse discriminatory treatment, and government may not deny or condition the receipt of a benefit or privilege provided by the state to an individual, in a way that infringes upon an individual's religious liberty. These keystone principles of our legal system are effected, in different ways, through the Free Exercise, Equal Protection and Free Speech Clauses of the federal Constitution. By offering the state Promise Scholarship program to everyone except individuals who pursue degrees in theology, the State has intentionally violated these constitutional principles.

The case before this Court does not, as petitioners and their amici feign to believe, implicate whether the State can be required affirmatively to fund the exercise of Davey's personal religious rights. The State, for example, could have decided legitimately to give awards only to those pursuing degrees in science and technology, and respondent would have had no legitimate legal claim that Washington had to provide him an award to study for the ministry. But Washington did not do this. It instituted a broad-based program to help deserving high school students; it gave financial awards to every student in Washington who came from a low to moderate income background, had done particularly well in high school and wanted to attend accredited Washington colleges. Those awards could be used for any education-related expenses. The State's exclusion of all those who pursued a degree in theology from eligibility for Promise awards is illegitimate. It is a species of particularized, person-specific legal disability which violates Free Exercise principles because it discriminates only against religious conduct, violates Equal Protection principles because it imposes a governmental classification keyed solely to religion, and violates Free Speech principles because it imposes purely viewpoint-based eligibility rules.

This case provides an opportunity to lay to rest the suggestion, implicit in the Washington Constitution and Wash. Rev. Code §28B.10.814, that state governments are allowed to violate federal constitutional rights and implement a policy of hostility to religiously motivated persons. The Framers of our federal Constitution would have found this idea an anathema. Both James Madison and Thomas Jefferson, while holding differing views in other First Amendment areas, joined in their "strong stances against a differential scope of rights based on religion," Mark Edward DeForest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 Harv. J.L. and Pub. Pol'y 551, 615 (2003), and a differential scope of rights is what the State of Washington has enshrined as law. The government's simple "obligation of neutrality in the face of religious differences," *Thomas v. Review Board of Indiana Employment Sec.*, 450 U.S. 707, 719-20 (1981), means that this sort of rank governmental discrimination must be rejected finally and for good.

ARGUMENT

This Court must hold, on the facts of this case, that religious discrimination in the grant of otherwise broadly available state benefits violates the Constitution. The State of Washington has imposed an eligibility restriction on state-sponsored financial aid which prohibits the award of all such aid, specifically including the Promise Scholarships at particular issue here, to any person, who is otherwise qualified, who would study theology. Washington's invidious discrimination violates this Court's jurisprudence in regard to Free Exercise, Equal Protection and Free Speech.

The proper resolution of this case, affirming the decision of the Ninth Circuit, does not require a decision that the State of Washington has any independent or freestanding constitutional obligation to fund the college careers of promising high school seniors. What the State of Washington is obligated to do is act with simple fairness towards applicants and not discriminate invidiously between them based on their religious beliefs and the extent to which they practice those beliefs.

The instant case deals only with whether Mr. Davey may be disqualified from a state scholarship program because he has declared a major in theology. The rules at issue do not restrict eligibility by reference to the sort of institution that students who ultimately receive the funds may attend, except that they must be in Washington and accredited. The program does not restrict the use, whether for religious purposes or not, that can be made of the funds after they pass into the recipients' hands. The choice of which education-related expenses the award will be used to pay for is made by individual students. The funds may be used for any education-related expenses as directed by the student and so may ultimately all flow to a software company, a pizza parlor, an apartment complex or a college or university in Washington State. The program is not restricted to studies in any particular academic area, like nursing or physics. The only curriculum-related disqualification is that persons declaring a major in theology are not eligible for the award.

The "theology" disqualification appears in a state statute, "[n]o aid shall be awarded to any student who is pursuing a degree in theology." Wash Rev. Code §28B.10.814. This statute applies the state constitutional barrier to the appropriation or application of "public money [to] religious . . . instruction." Wash. Const. Article 1, §11. State case law, and the Attorney General's brief, make clear the disqualification is for "religious instruction" rather than "instruction in religion." Brief of Petitioners at 5-6, 22-23. It is a content-based restriction, disfavoring those who study religion for the religion's own sake. This disqualification is not only a classification based on religion (versus nonreligion), but a classification among religious studies. The State has decided that theology (however labeled by the school) is always a religious exercise akin to worship. *See Calvary Bible Presbyterian Church v. Board of Regents*, 72 Wash. 2d 912, 919 (1967). In other words, those serious about their religious studies (as presumed by the State) need not apply. On the facts of this case, that result may not be sustained.

I. The Promise Scholarship Program Imposes a Discriminatory Classification Based on Religion.

A. Free Exercise Principles

"At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 531-32 (1993). More specifically, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533 (citations omitted). Both the text of a law, and its effect in practice, are to be examined in determining whether "impermissible targeting" of religion is taking place. Here, as in *Lukumi*, "almost the only conduct subject to [the language of the rules in question] is the religious conduct" of the person challenging them. *Id.* at 535. In fact, by its own language, it is only inherently religious conduct that could be subject to the prohibition on "pursuing a degree in theology," since those engaged in the study of religions as a purely

academic pursuit are not prohibited by Washington's law from receiving Promise awards, and indeed many such courses are taught in Washington State colleges. J.A. 65-74.

The Promise Scholarship program provides funds to those who participate in the secular study of religion as well as all other disciplines, and only makes ineligible those who are pursuing "religious instruction" defined as the study of theology.[2] *See, e.g.*, Brief of Petitioners, at 5, 6, 10, 11. In fact, the effect of the rule on Mr. Davey was that he recognized that the Fromise program presented him with a choice between his own beliefs and receipt of the award.[3] The Promise program was understood by school officials to draw distinctions based on "faith-based criteria". J.A. 158. The "effect of this law in its real operation", *Lukumi*, 508 U.S. at 535, is clearly to target religion impermissibly.

Similarly *McDaniel v. Paty*, 435 U.S. 618 (1978), holds that religious persons may not be disqualified from public programs or benefits solely on that basis. In *McDaniel*, the State of Tennessee acknowledged that adults generally could seek and hold office as delegates to state constitutional conventions, just as Washington acknowledges that high achieving students of modest incomes attending Washington colleges generally are entitled to Promise Scholarships.

> Yet under the clergy-disqualification provision, McDaniel cannot exercise both rights simultaneously

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[2]The disqualification sweeps more broadly, disqualifying all theology majors for receipt of the award regardless of whether those students plan to enter the ministry (plainly to advance religion) or not.

[3]This choice is a result of the fact that Davey was deemed to have been "pursuing a degree in theology" because he declared a major in Pastoral Ministry. Absent the strong religious motivation that led him to declare that major, and so led to the consequent conclusion that Davey fit the rubric "pursuing a degree in theology," a Promise award would have been forthcoming no matter what courses Davey was taking at Northwest College ("Northwest") or how he intended to pay for them. The overinclusiveness and underinclusiveness of this rule show that it also could not pass even rational basis scrutiny.

> because the State has conditioned the exercise of one on the surrender of the other. Or, in James Madison's words, the State is "punishing a religious profession with the privation of a civil right." . . . . In so doing, Tennessee has encroached upon McDaniel's right to the free exercise of religion. "[T]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalizes the free exercise of [his] constitutional liberties." *Sherbert v. Verner*, 374 U.S. 398, 406 . . . (1963).

McDaniel, 435 U.S. at 626. The line drawn by the Court in *McDaniel* is equally applicable here.

It is no answer to suggest, as the State does, that Davey need not give up the actual substance of his religious beliefs themselves in order to receive a Promise award. Brief of Petitioner, at 12, 23-31. That is, it is true that he need not convert to another religion or renounce his own in order to be eligible. But *McDaniel* focuses explicitly on the "exercise" of rights, 435 U.S. at 626, not simply on their existence in a vacuum. "The Free Exercise Clause 'protects religious observers against unequal treatment.'" *Lukumi*, 508 U.S. at 542, quoting *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987). Davey cannot exercise his conceded right to decide to pursue a degree in Pastoral Ministry without losing the award to which he is otherwise entitled.

The genuine significance of *Lukumi* and *McDaniel* is to be found, not in the specifics of the opinions, but in the underlying values that are common to them, the reasons they were decided as they were. To target religion for adverse, discriminatory treatment either as "a religion" (as in *Lukumi*) or as an individual religious practice or status (as in *McDaniel*), or both (as here), is constitutionally impermissible except for the gravest of reasons. That religion generally is here targeted for discriminatory treatment is manifest from the fact that the state draws invidious governmental distinctions between learning about religion from an academic perspective, which is no barrier to

receipt of a Promise award, J.A. 65-74, and learning about religion from a "faith-based" perspective, which disqualifies one from the Promise program, J.A. 158. Indeed, those pursuing a degree in theology from a faith-based perspective are thereby disqualified from receiving all forms of state educational aid, not simply a Promise Scholarship. J.A. 45, 61.

The claim that such a law could possibly be religiously neutral and generally applicable is incredible on its face, because the only nonacademic and nonincome related standard contained in the eligibility requirements of the program is that the student cannot be "pursuing a degree in theology." *Davey v. Locke*, 299 F.3d 748, 751, 753 (9th Cir. 2002). This negative sanction, which is applied only against those persons who study religion as religious instruction, is unquestionably not religiously neutral, nor can it be viewed as generally applicable because it identifies only students studying religion for religious reasons for state disapproval. That is a religious classification.

Davey could have studied precisely the same religion courses, at the same school, with the same professors, and have received the Promise award. But his simple declaration of a major which fits the "degree in theology" standard described by the State, motivated by his desire to study from a faith-based perspective and enter the ministry, resulted in the loss of the scholarship. That is a religious classification within a religious classification.

The question of "how much" interference with the free exercise of religion is constitutionally "too much" is implicitly raised throughout briefing, by and in support of petitioners here. As the Ninth Circuit put it, the State "distinguishes *McDaniel* on the footing that McDaniel was prohibited from being a delegate as a result of being a minister, whereas Wash. Rev. Code §28B.10.814 does not prohibit Davey from pursuing a degree in theology." *Davey*, 299 F.3d at 754. This draconian standard suggested by petitioners, that one must be "forced to forgo his religious calling" before the Free Exercise clause is implicated, *Davey*, 299 F.3d at 754, misstates the law.

"[I]t is too late in the day to doubt that the libert[y] of religion . . . may be infringed by the denial of or placing conditions upon a benefit or privilege" accorded by the state. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). These words from Justice Brennan capsulate the thesis of the instant brief. Joshua Davey may have had – apart from the Washington State Promise program – no freestanding legal right to receive state support for his college studies, and Washington may not have statutorily required Davey to forgo his religious calling, but the State has clearly abridged his freedom of religion by placing conditions upon and ultimately denying him the benefits of a broadly available scholarship program the State had created for all high performing, moderate income students from the State who wanted to attend college in Washington.

B. Equal Protection Principles

The same principle, that government may not penalize or discriminate against individuals because they are observing or exercising their religious beliefs, is also protected by way of the Equal Protection Clause. Chief Justice Burger in *Meek v. Pittenger* recognized this linkage when he wrote, "One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendments's guarantee of free exercise of religion, thus eliminating the denial of equal protection" inherent in prohibiting children from receiving tax-supported remedial programs in religious schools, but making those benefits available to those who went to nonreligious schools. 421 U.S. 387, 439 (1975) (Burger, C.J., concurring in judgment in part and dissenting in part). "Affluent parents . . . will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice" between their religious needs and their need for the financial benefits the government program offers. *Id.* This is exactly the quandary that enforcement of the Washington eligibility standards creates here. It forces students to choose between a state sponsored program from which they are entitled to benefit, and pursuing honestly and openly their own vocations.

The essence of the Equal Protection Clause is the "command[] that no State shall 'deny any person within its jurisdiction the equal protection of the laws.' " *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Classifications among citizens may proceed on any number of bases. Religion, however, is itself a prohibited basis for governmental classifications, one that leads to strict scrutiny review. *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990). Religion is an "inherently suspect classification." *City of New Orleans v. Duke*, 427 U.S. 297, 303 (1970); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961 (N.D. Ill. 2003). When the basis for the classification is to disfavor the exercise of a constitutionally protected right, then Equal Protection guarantees have been transgressed. "If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional." *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969).

The classification by which the State of Washington decided to disfavor those in Davey's position is clearly religious in at least two ways. On the face of the eligibility criteria and Wash. Rev. Code §28B.10.814, the State targets "theology" and "religious worship," by name, for adverse treatment. The record below demonstrates clearly that the way in which these terms are defined in practice is to penalize those whose study of religion has a faith-based motivation. These eligibility restrictions discriminate based on religion between those who study for a degree in theology, and those who either pursue any other degree for any reason whatsoever, those who study religion less seriously (*i.e.* who do not declare a major in theology but may take the same classes), those who study religion seriously but avoid declaring a theology major, or those who pursue the study of religion from an academic and historical perspective. Indeed, many of the courses taught at Washington State University qualify as studies of theology by name or description. J.A. 67-74. It is only respondent's personal choice to pursue Pastoral Ministry at Northwest that caused the State to disqualify him for the Promise award he would otherwise have received. In so classifying by religion (or perhaps by "religion more actively practiced"), the State has impinged on personal rights particularly protected by the Equal Protection Clause.

C. Free Speech Principles

In *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995), this Court held that religious discrimination by an arm of the state, based on the degree and nature of religiosity of one's speech, violated the Free Speech Clause. As in *Rosenberger*, the funding distinction drawn by the State here is "invidious" and is drawn to "ai[m] at the suppression of dangerous ideas," *Rosenberger*, 515 U.S. at 834 (citations and internal quotation marks omitted), because it is aimed at religion. *Rosenberger* requires that when the government makes benefits available, it must be on a religion-neutral basis.

This Court's decision in *National Endowment for Arts v. Finley*, 524 U.S. 569 (1998), reinforces the application of *Rosenberger* to this case. The Court in *Finley* decided that the legislative requirement to take "decency and respect for the . . . beliefs and values of the American public" into account in making arts funding decisions, as part of a broader "excellence" standard, did not facially violate constitutional Free Speech standards. *Finley*, 524 U.S. at 576, 586.[4] But in doing so it emphasized that *Rosenberger* struck down the viewpoint-based restrictions at issue there, in part because the funding was otherwise available to <u>all</u> student organizations that were related to educational programs. *Finley*, 524 U.S. at 586. Promise awards, by analogy, are available to all otherwise eligible students to use for educational purposes. *Finley* also distinguished programs involving "comparably objective decisions on allocating public benefits". *Id.* The Promise program, of course, uses purely objective standards in awarding aid, specifically the students' rank in class, whether family income exceeds 135% of the state's median family income, and the geographic location and accreditation status of the college in question. J.A. 50-51.

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[4]The decision in *Finley* would certainly have been different if the Court had been reviewing a program in which Congress had directed NEA to fund all arts projects proposed by skilled artists of low to moderate income, but had then directed NEA to exclude from eligibility, for <u>all</u> NEA grants, all artists working from a faith-based perspective.

In *Rosenberger*, the University of Virginia funded certain expenses of a number of student publications, defined as those that published "student news, information, opinion, entertainment, or academic communications media groups." *Rosenberger*, 515 U.S. at 824. But the University had denied funding for one particular student publication that wrote from an evangelical Christian perspective, even though the scope of the funding program clearly covered the expenses of the publication in question, *Rosenberger*, 515 U.S. at 825-26, and other student publications writing on religious issues were funded. *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring). This Court held that the First Amendment prohibited such discrimination against the organization when it sought financial aid generally available to other student groups, where its funding request otherwise came within the scope of the program at issue. *Rosenberger*, 515 U.S. at 837. This sort of viewpoint discrimination was proscribed by the University's obligation to administer its programs without discriminating on the basis of religion. *Id.* at 829. The University had drawn the line and disqualified Rosenberger's publication because his publication actively promoted religion as religion. In other words, it took its religious practices seriously. That form of content-based classification infringed the Free Speech Clause. To the same effect, albeit in a different context, is *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001). The same sort of viewpoint-based disqualification is operative here. In Washington, a student receiving a Promise award can study religion on any basis – except as truth.

II. The Religious Classification Lacks a Compelling Justification.

Washington attempts to justify its discriminatory exclusion of theology degree candidates from the Promise award program on several grounds. It denies the violation of law but justifies the burden on religion by pointing to cases that reject attempts to force government to fund the exercise of some right. The State strongly suggests it has every right to condition the use of its funds on the promotion of its public policy and, implicitly, that that public policy may legitimately be anti-religious. In the end the State argues that its scholarship program avoids the advancement of religion contrary to

state and federal constitutional law. Indeed, it is argued that this state law actually protects religious liberty. Brief of Petitioners, at 5-6; Brief Amicus Curiae of Historians and Law Scholars on Behalf of Petitioners Gary Locke, *et al.*, at 30. Whatever merit these arguments might have in a vacuum, they do not rise to the compelling justification required to legitimize the violation of Mr. Davey's rights.

A. Arguments from Case Law

The State and its amici rely on the line of cases known as the "Sunday Closing Cases" for the proposition that a financial burden on a person who exercises his religion is insufficient to upset a governmental decision. In *McGowan v. Maryland*, 366 U.S. 420 (1961), *Two Guys from Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961), *Gallagher v. Crown Kosher Super Market of Mass.*, 366 U.S. 617 (1961), and *Braunfeld v. Brown*, 366 U.S. 603 (1961), this Court considered and rejected challenges to a number of so-called Sunday Closing laws, brought on a variety of different constitutional theories.

In *McGowan*, the Court sustained a closing law in the face of Equal Protection, Due Process and Establishment Clause challenges. It found a legitimate basis for the distinctions drawn between items permitted to be sold on Sunday and those not, and found that while 1800's-era Sunday closing laws were motivated in part by religious reasons, there were sound contemporary secular reasons for setting aside Sunday as a day when stores generally would be closed, including the need for rest and recreation, and improvements to health and the public safety. *McGowan*, 366 U.S. at 428, 431-34, 436-42. The Court rejected the Free Exercise challenge to the law because claimants alleged only an economic injury and made no claims related to infringement on their religious beliefs, and adduced no proof of what those religious beliefs, if any, were. *Id.* at 429. To the same effect were *Gallagher*, 366 U.S. at 622-27, 630-31, and *Braunfeld*, 366 U.S. at 602-05. In *Two Guys*, the Court rejected both the Establishment Clause and Equal Protection claims the plaintiff raised, because the statutes had no governmental purpose, or any effect, of promoting religion, and did not classify in any identifiable way that

treated plaintiffs differently from any other citizen. *Two Guys*, 366 U.S. at 590-92, 598.

These cases are inapposite to the issues here – indeed, they undercut seriously the basic Free Exercise argument Washington advances, the superficially attractive claim that the State has not prevented Davey from practicing his religion, even if it has made it more expensive for him to do so. Brief of Petitioners at 12, 21-23, 31-33, 36. First, there was no showing in any of the Sunday Closing Cases of a legislative intent to affirmatively disfavor any individual or group on account of his religion or his practice of it, for example, an intention to injure the interests of observant kosher market owners in *Gallagher* or *Braunfeld*. But as Wash. Rev. Code §28B.10.814 and the State's eligibility criteria demonstrate on their face, they intentionally disfavor those who would major in theology, and operate to the greatest disservice of those who take their religious beliefs most seriously.

Second, in none of these cases does it appear that the government, by imposing its rules or classifications, had deprived plaintiffs, by reason of their religious beliefs or practices, of an affirmative governmental benefit to which they would otherwise have been entitled. But in the instant case Davey lost a significant governmental benefit simply because of his religious motivation for declaring a particular major, which constituted the pursuit of a "degree in theology." Third, in each of these cases the Court found significant and purely secular health, recreation, and safety reasons for the present-day enforcement of the closing laws. In contrast, Washington has enunciated no good reason to have singled out the vigorous religious observer and targeted him for adverse governmental treatment. The government of the State of Washington has no legitimate interest in making sure fewer people receive degrees in theology, or that they have greater financial difficulties paying for college than their peers do who are majoring in other disciplines.

The Sunday Closing Cases would have resulted in dramatically different opinions if, for example in *Braunfeld* or *Gallagher*, the State had provided all grocers and butchers a significant governmental tax benefit, but had then passed legislation

providing that grocers or butchers who did not operate on Saturdays for religious reasons were not entitled to those benefits and in addition were not entitled to any other business-related tax benefits, just as Davey, because he was "pursuing a degree in theology," was ineligible not just for the Promise Scholarship but also for all other forms of governmental student aid. J.A. 45, 61.

For the same reasons, reliance on challenges to governmental decisions not to fund religious education or private school transportation are inapposite. In no case was the claimant denied a benefit solely and exclusively because of religion. In *Brusca v. Missouri*, 332 F.Supp. 275 (E.D. Mo.) (three judge court), *summ. aff'd*, 405 U.S. 1050 (1972), parents claimed unequal treatment and religious discrimination because the state funded public education, not religious schools. The court recognized the State's obligation was only to provide a free public education, noting "as no invidious discrimination exists, the courts may not interfere." 332 F.Supp. at 279. The parents chose a non-public education for their children as was their right. No nonpublic education was funded at taxpayers' expense. In contrast, eligible students pursuing all post-secondary education in Washington may receive Promise awards – except those majoring in theology studies. As described above, the failure to include theology in the circumstances of this case is discriminatory.[5]

Petitioners rely on *Norwood v. Harrison*, 413 U.S. 455 (1973), for the same proposition. *Norwood* only holds that a State might constitutionally not provide any assistance to any private school

[5]In much same way, *Leutkemeyer v. Kaufman*, 364 F.Supp. 376 (W.D. Mo.) (three judge court), *aff'd*, 419 U.S. 888 (1974), also deals with a different question from the one posed here; the government there took the position that state-funded bus transportation could not be provided to any students attending nonpublic schools. *Leutkemeyer*, 364 F.Supp. at 379. This position was based on a state constitutional provision that said state education funds were to be used only for the support of public education. *Id.* Thus, the District Court's decision in favor of the state in *Leutkemeyer* means only that states can decide not to fund any private education at all. The government's position did not turn upon a religious/nonreligious distinction, but on a private/public distinction, and the District Court did not decide that the State could discriminate on the basis of religion in the implementation of one of its existing programs.

without necessarily violating the Free Exercise Clause. *Id.* at 462. This case is no support for a State's religiously discriminatory actions in regard to scholarship aid for students. Indeed, this Court noted that states may not act "without regard to constitutionally mandated standards forbidding state-supported discrimination." *Id.* at 463. The "values inherent in the Free Exercise Clause" are entitled to positive constitutional protection that private racial bias is not. *Id.* at 469-70.

B. Funding Conditions

The State cites, in particular, *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), and *Rust v. Sullivan*, 500 U.S. 173 (1991), for the unremarkable but inapposite conclusion that, when a state institutes a particular social program, it does not have the obligation to fund all other, including religiously-based, alternative viewpoints to that program. In particular, Washington need not fund the exercise of even fundamental rights. We agree. But when the State engages in discrimination, these cases do not provide shelter. Indeed, they point the other way.

In *Regan*, the Court approved a distinction among organizations doing lobbying, which had the effect of making some tax exempt, and some not. That groups, like Taxation With Representation, would be exercising free speech rights in doing lobbying, did not mean that the government's actions were constitutionally suspect or required the application of strict scrutiny in the face of an Equal Protection challenge. 461 U.S. at 549. But that case did not involve discrimination against religion. *Id.* at 547. Indeed, one line the Court drew was that

> [t]his case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to ai[m] at the suppresion of dangerous ideas. . . . But the veteran's organizations that qualify under §501(c)(19) are entitled to receive tax deductible contributions regardless of the content of the speech they may use . . . . We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect. The

> sections of the Internal Revenue Code here at issue do not employ any suspect classification. The distinction between veterans' organizations and other charitable organizations is not at all like distinctions based on race or national origin.

Regan, 461 U.S. at 548 (internal quotation marks omitted). This, of course, is the point. Washington's eligibility requirements do discriminate invidiously against persons holding specific religious positions, its benefits are not available "regardless of the contents" of those views, and religion is very much a suspect classification like race and national origin.[6] Further, the State cannot deprive Davey of a benefit that would otherwise be available to him because his usage of that benefit would be done from a "prohibited perspective." *Rosenberger*, 515 U.S. at 834.

Rust v. Sullivan, *supra*, upheld the federal government's prohibition against Title X grantees conducting abortion counseling or referrals when acting as part of a federal family planning program. Because the program in *Rust* was about contraception, abortion referral and counseling was, by definition, outside its scope. The program did not discriminate in terms of eligibility for its benefits, and certainly not on a religious basis. No religion or viewpoint based distinctions were drawn in determining whether the services funded by the program would be made available to individuals who wanted them. *Rust*, 500 U.S. at 193. There is nothing in the *Rust* opinion that would suggest the benefits of that or any other government program could be denied to one otherwise eligible for them because of the way that person exercised a fundamental constitutional right.

As the *Rust* Court said, "we have here not the case of a general law singling out a disfavored group on the basis of . . . content, but of the Government refusing to fund activities . . . which

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[6]The Court in *Regan* also noted that Congress could rationally decide to accord veterans' groups special protections, in view of veterans' service to the country. *Regan*, 461 U.S. at 551. Governments cannot, consistent with the Religion Clauses, rationally decide to benefit all eligible scholarship applicants except those with religious motivations for their studies.

are specifically excluded from the scope of the project funded." *Id.* at 194. This is a far cry from the intentional religious discrimination effected by withdrawal of an award which was specifically included in the scope of the project the State had funded, to assist high performing, moderate income students attend college in Washington. J.A. 50-51, 53.[7]

Thus, only if evaluated in both a legal and factual vacuum does petitioners' position have merit. It may be true that if it were not for his qualifications for the Promise program, Mr. Davey might have no freestanding, independent right to have the State provide him with money that he could decide to dedicate to any education-related expenses. *Davey*, 299 F.3d at 751. He does, however, have the right, having fulfilled the requirements of that program by virtue of class rank, family income, residence, and location and type of institution he intended to attend, not to have that benefit revoked because he had the "wrong" subjective religious motives for pursuing his studies, and had declared a major in Pastoral Ministry. A government may not restrict

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[7]Both *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), are fully consistent with this position. Neither suggests that a person otherwise eligible for services under a government benefit program can legitimately be excluded from receiving those benefits due to intentional religious discrimination on the government's part. Neither supports the idea that the government may discriminate by religion in deciding how its public benefits may be administered. They stand only for the related but not coincident point that the government may generally decide in the first instance what programs to fund. There is no inconsistency with Davey's position here.

The Court in *Harris* was at pains to point out that if the government had made women who obtained abortions ineligible for "all Medicaid benefits" for which they otherwise qualified, then this would probably be unconstitutional. *Harris*, 448 U.S. at 317, n.19. By analogy this is what the State of Washington did here. Its discriminatory religious standard denied Davey all the benefits of the Promise program, and indeed all state financial aid. 1 A. 61.

Still less was there any claim in *Harris* or *Maher* that the benefits the Medicaid program did provide to these low income women were being withheld from them because of their religious beliefs or exercise. In *Harris* and *Maher* the government decisions were not predicated on a constitutionally suspect classification – low income women pursuing abortions are not a suspect class for purposes of the Court's equal protection analysis. *Harris*, 448 U.S. at 323, citing *Maher*, 432 U.S. at 470-71. Religion, however, clearly is a suspect classification. *City of New Orleans v. Duke*, 427 U.S. 297 (1970); *Torcaso v. Watkins*, 367 U.S. 488 (1961).

a constitutionally-protected right, even by merely withholding a benefit. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Planned Parenthood of Cent. and N. Ariz. v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *citing Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

More than 20 years ago, this Court invalidated a state policy that discriminated against student religious organizations by barring them from using a public university's facilities. *Widmar v. Vincent*, 454 U.S. 263 (1981). The state had decided that all student groups generally would be given the benefit of access to such facilities, excluding only religious groups. Even where there clearly was no argument that any student group, let alone a student religious group (by virtue of its religiosity) had an independent right to use these facilities, when they had been made broadly available, the state could not constitutionally discriminate against those who wished to use those same benefits for religious reasons. *Widmar*, 454 U.S. at 267-70.

C. Advancement of Religion

Washington points to a desire to avoid taxpayer support for religion through public funding, avoiding establishment of an official church, and avoiding entanglement of government with religion. Brief of Petitioners at 35, 40-41. Avoidance of governmentally compelled support for religion contrary to a taxpayers' own religious views and avoidance of governmentally established churches are legitimate values, but they are scarcely threatened by awarding Promise Scholarships in a religiously nondiscriminatory manner. It is established law that taxpayers are not being unconstitutionally compelled to support religion when taxpayer funds are administered by the government to benefit a broadly available social program with secular goals under which benefits may flow to religious organizations only as the result of private choice.

The only "support for religion" that could possibly arise from an award here would be as a result of the entirely personal and private decision of an individual – not a government or its arm – to use neutral state benefits to pay for certain courses. But that decision is not in any sense the state government's.

In *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), this Court held clearly that the federal Establishment Clause did not prohibit a state from providing special education funds to an individual with a visual disability who sought to use those funds to obtain a religious education. Any aid that ultimately flowed to the religious institution did so only as a result of a genuinely independent and private choice by the recipient of the aid. *Witters*, 474 U.S. at 487. The aid was generally available to qualified individuals without regard to the affiliation of the schools attended. *Id.* at 487-88. The program created no incentive or greater benefit for individuals to seek a religious education. *Id.* at 488. Finally, and significantly, the decision where to use the funds was not attributable to the state. *Id.* at 489. Thus, the critical factor in *Witters* was that the individual, not the state, made the decision where to apply a neutrally available public benefit. All of these factors are present here. Accord *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

The Promise program would fulfill all of these requirements were it not for the religious discrimination provision that infects it. The program provides that a "warrant," the equivalent of a check, goes to all Promise Scholarship recipients individually. J.A. 7, 27. These payments are channeled through college aid offices only to confirm that the student has registered and is pursuing the requisite amount of course work. J.A. 27. All the benefits flow directly to the student, who receives all the funds represented by the "warrant" and can use it to pay for any education related expense, including room, board, tuition, books, supplies, computer software, food and lodging expenses and even field trips. J.A. 57-58, 153-54. The college cannot deduct or withhold funds from the scholarships for any reason, and no part of the scholarship is payable to the school directly. J.A. 57-58, 184. Obviously, if the individual recipient decides to use these funds to pay for classes needed to pursue a degree in theology the State is taking no part in that decision. There is no Establishment Clause risk to be apprehended here, and no compelling interest in avoiding its violation on the government's part has been demonstrated.

Any "excessive entanglement" of government with religion, *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is also to be avoided. Absent the theology exclusion, the grant of a Promise award does not

entangle the State in religion at all. Indeed, granting Promise awards without any inquiry into the religious nature of, or motivation for, studies is self-evidently more likely to avoid entanglement than will the State's policing of religion-focused eligibility standards.[8] This is constitutionally offensive; if there is entanglement to be seen here, it is in the State's enforcement of its antireligious restrictions, not in a grant of a scholarship. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (government "may impinge on rights guaranteed by the Religion Clauses" by the "very process of inquiry" into them).

Washington also asserts a state interest in treating secular and religious instruction differently in order to avoid the "official advancement" of religion, thus raising the possibility of federal Establishment Clause concerns if it does not so discriminate. Brief of Petitioners at 40-41. Whatever merit such a federal claim might have had,[9] the fact is that there is absolutely no federal Establishment Clause risk to be apprehended here. Under *Zelman*, *supra*, the payment of a Promise award to Davey is clearly constitutional under the Establishment Clause.

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[8]In fact, the course of this litigation demonstrates that it is the State, in applying the "no theology" requirement and in defending its position below, that has intentionally entangled itself in religion. The State has intruded itself deeply and unnecessarily into religious issues, witness the State-required certifications, J.A. 45, the State's charge to colleges to decide the religious nature of majors being pursued, J.A. 45-46, 60-61, 86, and the State-imposed Conditions of Award, J.A. 92. At deposition, the State inquired into the effects on Davey's own spiritual development of the revocation of the scholarship, and the reasons why Davey wanted to study for the ministry, J.A. 101-109, Davey's perception of the different views of Biblical teaching offered by different colleges, J.A. 106-10, and even inquired into the nature of Pentecostal doctrine and Davey's own personal religious practices. J.A. 111-13. This also drags State officials into the quagmire of defining "theology" and other religious concepts. J.A. 124-26.

[9]The three cases emphasized by petitioners as support for this notion are seriously off point. *McCollum v. Board of Education*, 333 U.S. 203 (1948), *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), and *Stone v. Graham*, 449 U.S. 39 (1980), share one crucial characteristic. All dealt with, and only with, whether the State itself may decide to teach, in its schools, a necessarily-state-approved set of religious principles.

As for the state law claim, Washington vaguely suggests a governmental interest in the particularly "clear demarcation" of the religious from the secular under Washington's own State Constitution, asserting that a State may be more restrictive than the federal Constitution requires. Brief of Respondent at 35-36. The State offers no authority for the legitimacy of this interest, or for its dimensions. A State's alleged interest in creating a greater separation of "church and state" than needed under the federal Establishment Clause is not sufficiently compelling to justify state discrimination based on religion, where that discrimination collides with federal Free Exercise protections.[10] *Widmar v. Vincent*, 454 U.S. at 274-76.

Finally, the "narrow tailoring" requirement of *Lukumi* and its antecedents is also violated here. The prohibition on "pursuing a degree in theology" is at once under- and over-inclusive, and in particular is so broadly applicable as to disfavor all persons "pursuing a degree in theology," which has been interpreted to mean "for reasons of personal religious belief." The rule applies no matter what school the individual attends, no matter what use is to be made of the money involved, and whether or not any "offending" course work is even to be paid for by the recipient using funds that originally came from the government.[11] And, as noted above, Washington's rules deprive anyone pursuing a degree in theology not only of a Promise Scholarship but of "any state-funded student financial aid, including the new Washington Promise Scholarship." J.A. 61 (emphasis in

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[10]Significantly, not even the States writing as amici in support of the State of Washington take the position that following the dictates of state constitutions itself constitutes a compelling state interest. Rather, they note the contrary authority of *Widmar* without rejoinder. Brief of the States of Vermont, Massachusetts, Missouri, Oregon and South Dakota and the Commonwealths of the Northern Mariana Islands and Puerto Rico Amici Curiae in Support of Petitioners, at 9, 10.

[11]The anti-Catholic motivation behind Blaine Amendments generally and Washington State's in particular is undeniable. DeForest, 26 Harv. J.L. and Pub. Pol'y at 559-64, 570-73, 590-601. This historical prejudice and its relationship to present-day law is thoroughly analyzed in the brief amici curiae filed herein by The Becket Fund for Religious Liberty, and others. Brief of *Amici Curiae* The Becket Fund For Religious Liberty, the Catholic League for Religious and Civil Rights, and Historians and Scholars in Support of Respondent.

original). This is not narrow tailoring; it is a broadside attack on religious practice firing grapeshot, bar and chain.

CONCLUSION

In short, the Washington eligibility standard at issue here discriminates directly against Davey and individuals like him for reasons of religion. It does so, perversely, in a way that discriminates specifically against those who take religion most seriously and practice it most vigorously. This Court should make clear that it is no part of the work of government to discriminate against religious believers on that basis, or to prevent them from participating in governmental programs for which they would qualify. Religious differences are not to be feared or suspected, and that antipathy is certainly not to be enshrined in state legislation and enforced by our state governments.

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